No. 10497

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

B. H. PRENTICE,

Appellant,

vs.

L. BOTELER, Trustee in Bankruptcy of the Estate of DR. W. J. ROSS COMPANY, a Corporation, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

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APPELLEE'S BRIEF.

An examination of the printed Transcript of Record on appeal will disclose that this appellant has incorporated therein a great deal of unnecessary matter, whether with the idea in the event of reversal, of incorporating a lot of unnecessary costs in the cost judgment, or whether with the idea of confusing the Court on the record, we do not know. However, we wish to call the Court's attention to a great deal of irrelevant and extraneous matter, which this Appellant has caused to be printed after omitting all of the important jurisdictional foundations in his original designation, requiring us to file a counter designation of the jurisdictional portions of the record. [Tr. p. 82.]

We wish to call the Court's attention particularly to the Points and Authorities in support of Petition to Re-

view Order Confirming Sale of Real Property [Tr. pp. 33-39], and Peitioner's Statement of Facts in Lieu of Reporter's Transcript [Tr. pp. 39-47], which the Referee refused to sign, also, the document designated as Deposit to Guarantee to Estate Better Price for the Sale of Certain Real Property, which indicates on its face that the deposit was not made until nineteen days after the sale and sixteen days after the Order of Confirmation also the Notice of Motion to Amend Referee's Certificate on Review. [Tr. pp. 51-59.] Appellant has also printed a form of Order Dismissing Petition for Review and Affirming Order of Referee and Objections attached thereto beginning at Transcript page 60 and ending at page 66, which was not signed Judge McCornick at all, the actual Order Confirming the Referee's Findings beginning at Transcript page 67 and ending at page 71. Why appellant has seen fit to load this record with so much extraneous matter is beyond our comprehension.

The Facts.

Omitting the preliminaries to the sale in question in the interests of brevity, the Trustee of this estate had in his possession a piece of real property, substantially encumbered, and of which he was anxious to dispose. Upon due and proper notice to creditors, and after a creditor's meeting, he obtained an Order on July 20, 1942, which, among other things, authorized him to sell this real property *at private sale*. [Tr. p. 20.] A period of a little over seven months elapsed before the Trustee was able to negotiate even a private sale of this property. When the opportunity finally presented itself, he was fortunate in being able to negotiate a sale with the Baruch Cor-

poration for the sum of $2,250.00, which he represented to the Court in his Return of Sale as constituting the full value of the right, title and interest of the bankrupt estate in and to the real property in question. [Tr. p. 27.] Hearing on the confirmation of the private sale to the Baruch Company was set before Referee Ben Tarver at Santa Ana on March 10, 1943 at ten o'clock A. M. This appellant appeared at the hearing on confirmation of the sale to the Baruch Corporation together with one, T. H. Clements, attempted to raise the purchase price negotiated between the Trustee and the Baruch Corporation by the sum of Seventy Five Dollars, after the Referee had announced that no raises would be permitted of an amount less than 10% of the purchase price of $2,250.00 negotiated between the Baruch Corporation and the Trustee.

In discussing the facts behind this case, we are relying on the certificate on review prepared by the Referee himself, and not on the *ex parte* statements of appellant as to what the record should be or the affidavit of T. H. Clements, some of the statements contained therein shading the truth, to say the least.

The Referee refusing to consider any raises of the purchase price amounting to less than 10% by reason of the fact that the purchaser, the Baruch Corporation, relying on the confirmation of the Return of Sale of the Trustee for the full value of the property in question, had gone ahead and expended $75.00 for surveying the property and expended other amounts thereon making a total of $125.00 [Tr. p. 18], declined to consider the small advance of $75.00 offered by Prentice. Prentice thereupon fixed up some kind of a check or voucher, the character of which the Referee was unable to determine

"as it was so crudely made out" [Tr. p. 14] and proceeded to confirm the sale to the Baruch Corporation. This was on March 10, 1943 and the formal Order confirming the sale was drawn, signed and filed on March 16, 1942. [Tr. p. 30.] After the ten days to take a review from the Referee's Order had expired this appellant tedered a cashier's check or bank money order, in the sum of $233.00, drawn on the California Bank, to the Referee, the check being made payable to both him and the Trustee. [Tr. p. 49.] On the same day, March 29, 1943, more than ten days after the entry of the Order of the Referee, appellant filed a Petition for Review. [Tr. p. 70.] On April 24, 1943, he obtained an *ex parte* order from Judge McCormick extending his time to review the Referee's Order to March 31, 1943 "without prejudice to the assertion by any party of any applicable rights." [Tr. p. 70.] On argument on review, the Order of the Referee was affirmed by the District Court, followed by this appeal.

Statutory Provisions.

Section 39c of the National Bankruptcy Act (11 U. S. C. A., Sec. 67c) reads as follows:

> "A person aggrieved by an order of a referee may, within ten days after the entry thereof or within such extended time as the court may for cause shown allow, file with the referee a petition for review of such order by a judge and serve a copy of such petition upon the adverse parties who were represented at the hearing. Such petition shall set forth the or-

der complained of and the alleged errors in respect thereto. Upon application of any party in interest, the execution or enforcement of the order complained of may be suspended by the court upon such terms as will protect the rights of all parties in interest."

Section 70f of the National Bankruptcy Act (11 U. S. C. A., Sec. 110f) in so far as material here, reads as follows:

> "Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. * * *"

Section 24a of the National Bankruptcy Act, in so far as material here, reads as follows:

> "The Circuit Courts of Appeals of the United States * * * are hereby invested with appellate jurisdiction from the several courts of bankruptcy, in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact: * * * Provided Further, That when any order, decree, or judgment involves less than $500, an appeal therefrom may be taken only upon allowance of the Appellate Court."

ARGUMENT.

Points and Authorities.

The Appellee respectfully submits that the Orders of the lower Courts should be affirmed and this appeal dismissed for the following reasons:

First: That the Petition for Review was not filed within ten days after the entry of the Referee's Order and the Order of the District Court made on April 24, 1943, almost a month after the Petition for Review had been filed, did not attempt to validate petitioner's failure to observe the statutory limitation on when a Petition for Review must be filed.

Second: That the amount involved in this appeal is the difference between the purchase price agreed to be paid by the Baruch Corporation for the property and the attempted increase of the same at the time of confirmation by this appellant in the amount of $75.00. That, therefore, this appeal is one allowable only by the Circuit Court of Appeals, as a matter of discretion.

Third: That in refusing to upset a private sale for the full value of the property negotiated by the Trustee with a good faith purchaser for a nominal increase, first at $50.00 and then at $75.00, the Referee exercised a sound judicial discretion, which should not be disturbed under the circumstances, and more so because this discretion was affirmed and approved by the District Judge.

We shall first address ourselves to the question of whether or not the Petition for Review was filed in time.

The Order of the Referee confirming the sale of real property was signed and entered by him on March 16, 1943. [Tr. p. 30.] The announcement of his intention to confirm and to make an Order accordingly, was made by the Referee in open court with appellant present at the time of the rejection of his bid. [Tr. p. 16.] Five or six days later, Mr. Prentice, the petitioner, was in the Referee's office and spent about an hour copying from the records in regard to the sale and confirmation thereof, in question here. [Tr. p. 18.] The Petition for Review was not filed until March 29, 1943, thirteen days after the entry of the Order. [Tr. p. 26; Referee's Certificate on Review, pp. 18-19.] On April 24, 1943, long after the Referee had certified the record up to the District Court [Tr. pp. 18-19], this appellant obtained an *ex parte* Order from Judge McCormick extending his time to review to March 31, 1943, "without prejudice to the assertion by any party of any applicable rights."

We respectfully submit that our right to move to dismiss this belated review had already accrued by reason of the petition not being filed until thirteen days after the entry of the Order. (Nat'l. Bankruptcy Act, Sec. 39c.)

In connection with the appeal taken to this Court, we submit that this is an appeal of a matter the allowance of which is discretionary with the Appellate Court, in view of the fact that the amount in controversy between the Appellant, the Trustee and the Baruch Corporation

is represented by the difference in their bids or the sum of $75.00.

Prior to the enactment of the 1938 Bankruptcy Act, a great deal of confusion existed with regard to what form of appeals should be allowed by the Circuit Court of Appeals and what forms of appeals were allowable as a matter of right by the District Court. Controversies in bankruptcy, as such, were appealable only with certain exceptions, as a matter of discretion to be exercised by the Circuit Court of Appeals. Under Section 25a of the Bankruptcy Act, judgments allowing or refusing a debt or claim of $500.00 or over were appealable as a matter of right. The confusion existing as a result of these two sections of the Bankruptcy Act resulted in many appeals being dismissed as having been taken the wrong way, or in an excess of precaution, attorneys in doubtful cases appealed both ways; one of the two being invariably dismissed at the time the case was decided. The 1938 amendment, in an effort to do away with all of this confusion, has grouped all forms of appeal together, with one exception, that being that when any Order, Decree or Judgment involves less than $500.00, an appeal therefrom may be taken only upon allowance of the Appellate Court. To date, there has been but little construction of this new statute.

In *England v. Ducasse,* 104 Fed. (2d) 760, a Trustee in bankruptcy petitioned this Court for allowance of an appeal from an Order of the District Court, which

reversed an Order of a Referee whereby a claim in the sum of $2,273.83 was allowed in the amount of $427.57, the balance being rejected. This Court held that this did not involve an amount less than $500.00, but actually involved the sum of $1846.26, being the difference between the amount claimed and the amount theretofore allowed, and that inasmuch as it involved over $500.00, the proposed appeal was not allowable by this Court. See, also, *In the Matter of Seville Court Apartments Building Corporation, Debtor*. C. C. A., 7th Cir., 134 Fed. (2d) 232, 53 Am. B. R. (N. S.) 84.

The reason for the $500.00 limitation on appeals as a matter of right is well set forth in the opinion of Judge Van Devanter in *Gray v. Grand Forks Mercantile Co.* (C. C. A., 8th Cir.), 138 Fed. 344, 14 Am. B. R. 780:

> "The purpose of the Congress in restricting the right of appeal was evidently to avoid inconvenience, delay, and expense to claimants and bankrupt estates which would be disproportionate to the amount in controversy. When read with due regard to this purpose, the restriction plainly has reference, not to the amount of the original claim, but to the amount of the allowance or rejection; that is, to the amount which will be put in controversy by the appeal. *Hilton v. Dickinson,* 108 U. S. 165; *Dows v. Johnson,* 110 U. S. 223."

We respectfully submit that the controversy here involves a difference of $75.00 in two bids for a piece of property and that the appeal is one of the type described in the foregoing authorities as involving a trifling amount.

Confirmation of a Private Sale of a Bankrupt's Property, Particularly Where the Purchase Price Constitutes 100% of its Value, Is a Matter of Judicial Discretion to be Exercised by the Referee With Which Discretion an Appellate Court Will Not Interfere Except Where it Is Evident That There Has Been a Clear Abuse Thereof.

Under Section 70f of the 1938 Bankruptcy Act (11 U. S. C. A., 110f) real and personal property belonging to a bankrupt estate shall be sold, subject to the approval of the court. It may not be sold otherwise than subject to the approval of the court for less than 75% of its appraised value. In the case at bar, the Trustee in his Return of Sale reported under oath that the purchase price constituted not—75%—*but the full value* of the right, title and interest of the bankrupt estate in the real property in question. [Tr. p. 27.] In an effort to overcome the force of this return at full value price, the appellant has printed at page 8 of the transcript a part of the schedules of the bankrupt in which it listed this property in the bankruptcy proceeding at its estimated value of $5,734.09. The Trustee, after the property had been duly appraised, found it to be actually worth $2,250.00, which the Baruch Corporation agreed to pay for it. In connection with the Debtor's valuation at $5,734.09, we must bear in mind that the bankrupt was seeking to put over a reorganization and that it was to his interest to inflate the assets as much as possible. The Court will note that in his Petition for Reorganization, Dr. Ross claimed to have machinery, supplies, equipment and boats worth $45,000.00 or more, a good will capable of producing $350,000.00 or more per year, and other very valuable assets as against approximately $69,-

000.00 of liabilities. Nevertheless, the bankrupt was found to be insolvent by the court and was adjudicated a bankrupt in spite of its inflated valuations.

It will be noted that the adjudication took place on June 17, 1942. [Tr. p. 10.] The Trustee qualified on July 8, 1942 [Tr. p. 11], and obtained his Order authorizing the sale of this real property on July 20, 1942. [Tr. pp. 20-21.] He did not obtain a purchaser even under the flexible provisions of the Order of Sale of Real Property until February 25, 1943, when he made his Return of Sale at the full value thereof to the Baruch Corporation. [Tr. pp. 21-24.] Hearing on confirmation of this 100% private sale was set for ten in the morning of March 10, 1943 before Referee Tarver at Santa Ana. Apparently, through inadvertence, the Trustee caused or permitted a notice to appear in the advertising columns of the Los Angeles Daily Journal, a legal publication of Los Angeles County, of the hearing on the sale. In the meantime, as certified by the Referee, the Baruch people had expended $125.00 in surveying and improvements on the property in question, rightfully assuming that inasmuch as they were paying 100% of its value for it, the sale would unquestionably be confirmed. This appellant for some reason beyond our comprehension, appeared at the hearing on the confirmation of the sale and attempted to upset it by making a small increase over the purchase price at which the Trustee had sold the property to the Baruch Corporation. Whether he intended to upset their purchase and hold them up for a greatly increased price, we do not know, but his conduct in connection with this matter would indicate, to our way of thinking, some sinister or ulterior motive.

In support of his alleged Statement of Facts, this appellant has presented in the Court below, an affidavit signed by one T. H. Clements, which has been brought up as a part of the record here at page 54, *et seq.* In a desperate effort to bolster up this appellant's cause, Clements has made some intemperate and, we are sorry to say, untrue statements in this affidavit. Clements states under oath that he entered Referee Tarver's office at 9:40 A. M. the day of the hearing and saw on the Referee's table *a signed confirmation of the sale to the Baruch Corporation having a consideration of $2,250.00* (italics ours). That this statement is manifestly untrue is evidenced at pages 26 to 30 of the transcript. An examination of the Order Confirming Sale of Real Property shows that it was signed on March 16, 1943 by Referee Tarver and filed the same day. Furthermore, the Order recites in the body thereof, the appearance of Prentice and his attempt to upset the sale. Manifestly, this Order could not have been prepared and signed in advance of the sale as Clements swears in his affidavit to be the fact. As a matter of fact, the Order was not prepared for several days after the sale, yet Clements swears it was signed by the Referee before the matter was called, a manifestly false statement. Clements also states in his affidavit that the Referee stated that he was going to sell the property in question at auction. The Referee in his certificate [Tr. p. 14] definitely certifies that he did not auction or state that he would sell the property at auction or that he would auction the same.

In his affidavit at page 57, Clements makes the following statement:

> "The Court then asked if there were any other bids, and this affiant did not make any further bids, it

> being the opinion of this affiant that this was a *rigged sale* and no one other than the Baruch Corporation was going to get the property regardless of what happened." (Italics ours.)

In other words, Mr. Clements accuses the Referee, an arm of the United States District Court, the Trustee, a bonded officer of the court, and the Baruch Corporation of being in a conspiracy to "rig" a sale simply because the Referee exercised his discretion in requiring that anyone seeking to upset a 100% private sale would have to raise it at least 10%. Had Mr. Prentice seen fit to make a 10% raise, the property would, no doubt, have been sold to him. Had he attempted to raise the sale price by the sum of fifty cents and his higher offer been turned down, he would still have complained.

We respectfully submit that in view of the expenditures made in good faith by the only prospective purchaser which the Trustee had been able to secure at private sale over a period of six months and the favorable reporting of that sale to the Referee by the Trustee and no objections being made by any creditors of this bankrupt, the Referee was vested with a sound discretion to require that any outsider coming in and seeking to upset the private sale negotiated and nearing completion be required to make a definite substantial raise of the purchaser's offer before the Court would entertain it.

Remington on Bankruptcy, Volume 6, Section 2565 at page 53 says:

> "In general, however, the court will be very cautious with respect to upsetting sales, for the contrary practice tends to drive honest business away from the bidding."

In *Century Motor Truck Co. v. Noyes,* cited in support of this statement, the Circuit Court of Appeals for the First Circuit in condoning the refusal to confirm a sale which was made for less than 75% of the appraised value of the property and after pointing out that in such cases, the District Court, as well as the Referee had discretion said:

> "Our decision in this case should not be taken as an approval of a general practice of upsetting sales which have taken place in the regular course of winding up a bankrupt estate. *Iacobsohn v. Larkey* (C. C. A., 3d Cir.); 245 Fed. 538; 40 Am. B. R. 563. This practice was long ago found in England to be an improvident one as it discouraged bidding at sales. *Graffam v. Burgess,* 117 U. S. 180; *White v. Wilson,* 14 Ves. 151."

In *Jacobsohn v. Larkey,* 245 Fed. 538-41; 40 Am. B. R. 563 at 566, the Circuit Court of Appeals for the Third Circuit says:

> "After much experience in scrutinizing bidding at judicial sales, courts now uniformly hold that the mere offer to pay more than the price bid is not a substantial ground for setting aside a sale, recognizing that nothing will more certainly tend to discourage and prevent bidding than a judicial determination that the highest bidder may be deprived of the advantage of his accepted bid by an offer of another person, subsequently made, to bid higher on resale. *Morrisse v. Inglis,* 46 N. J. Esq. 306, 19 Atl.

16; *In re Metallic Specialty Mfg. Co.,* 193 Fed. 300; *In re Shapiro,* 154 Fed. 673. * * *

When in a given case a price is grossly inadequate and when upon that ground confirmation should be refused, are matters within the judgment and discretion of the tribunal ordering the sale. When a trial tribunal orders a judicial sale subject to its confirmation under authority expressly requiring of it the exercise of discretion in approving or setting aside the sale (Bankruptcy Act, Sec. 70b), an appellate tribunal will not reverse its discretion by substituting its own nor will it otherwise disturb or interfere with its exercise so long as it does not amount to an abuse of discretion. *In re Shea* (C. C. A., 1st Cir.), 126 Fed. 153; 11 Am. B. R., 207."

In the *Matter of Orpheum Circuit, Inc.,* 20 Fed. Supp. 101; 30 Am. B. R., 131, the District Court said:

"The question is whether the referee's orders, on the proof before him, were correct. The entire bankruptcy proceeding having been committed to the charge of the referee, the power of this court is strictly one of review by an appellate judge. It has not the power to exercise an independent discretion in the matter. *In re Realty Foundation* (C. C. A., 2nd Cir.), 75 Fed. (2d) 286; 28 Am. B. R. (NS) 76."

Furthermore, any alleged irregularities (which, however, we do not concede here) in the sale of property in a bankruptcy proceeding are overcome by the confirmation of the sale by the Referee. See *Robertson v. Howard,* 229 U. S. 254; 30 Am. B. R., 611.

Conclusion.

The issue involved in this case is really one of public policy. Property of a bankrupt estate may be disposed of in any one of several ways, all, however, under the immediate supervision and direction of the Referee. In one case, it may be deemed expedient to permit the Trustee to operate the business and sell the stock in trade and other assets of the bankrupt at retail, over the counter to the public. This may be done under an Order of the Referee authorizing the operation and continuance of the business. In other cases, it may be deemed expedient to employ an auctioneer and conduct a piecemeal or bulk sale of the assets of the bankrupt, such piecemeal or bulk sales after the auctioneer's hammer has fallen on the highest bid, to be submitted to the Referee for confirmation. Many times such auction sales are held in the Referee's Court with the Referee or Trustee acting as auctioneer and the Referee summarily confirming each sale as the highest competitive bid is accepted. The fourth method of liquidation and one which is discretionary if an auction sale is not deemed feasible, is the method that was pursued in this case, the Referee issuing a permissive Order after due notice to creditors and with their approval, authorizing the Trustee to sell the property of the bankrupt to a purchaser at private sale, subject to confirmation by the Referee after such sale has been negotiated. In the case at bar, after six or seven months of effort, the Trustee succeeded in finding a purchaser, the Baruch Corporation, whose plant, we believe, adjoins the property in question. It negotiated with the Trustee for purchase of the property and agreed to pay the full valuation for it. Nothing more fair to creditors could

be asked for—and no creditors are complaining here. This appellant apparently figured he could go over to Santa Ana on the date when the confirmation of the sale was up for hearing and after the purchaser, in good faith, had expended funds on its purchase, which it had every good reason to believe would be confirmed, as it was paying 100% of the value of the property, and by a mere fifty or seventy-five dollars raise either deprive the purchaser of the fruits of its purchase or hold it up for a higher price than that which had been in good faith negotiated with the Trustee. Realizing that public policy required that private sales, when authorized by the Bankruptcy Court, should be accorded some stability and as a test of the good faith of this appellant, the Referee at the very onset of the proceedings announced that no raises of Baruch's purchase price would be entertained unless they amounted to at least 10% more. This we submit was a fair test of the adequacy of the purchase price offered to and accepted by the Trustee. If the property was worth 10% more than the $2,250.00 offered by the Baruch Corporation and accepted by the Trustee, then the Referee would have a reason to believe that for some reason the offer and accepted purchase price was substantially inadequate. Prentice stubbornly refused to accede to the 10% terms announced by the Referee before confirmation of the sale and we believe has spent a great deal more money than the proposed 10% in dragging this inconsequential matter from the Referee's Court up to this tribunal.

If this property had been sold at public auction and the Baruch Corporation had bid $2,250.00 and its bid had been raised at public auction by this appellant and the

Referee had refused to accept the raise, a different situation might present itself. However, as certified by the Referee, he expressly announced that the proceeding was not a public auction, in other words that it was merely the confirmation of a negotiated private sale and that no raises would be considered less than 10%. This announcement, no doubt, was made in order to give creditors an opportunity, if they so desired, to raise the bid 10%, if dissatisfied therewith. It is true that this appellant seeks to belie the Referee's own official certificate on review, but we submit that his *ex parte* statements of what occurred are of no value and should not be considered by this Court.

Mr. Boteler acts as Trustee in bankruptcy in numerous cases, as appears by the records of this Court on appeals in which Mr. Boteler, as Trustee, has been a party in the past. He has an interest in maintaining the stability of judicial sales in bankruptcy, where honestly negotiated. Counsel for the Trustee in this case are likewise counsel for trustees in bankruptcy in numerous cases and we, too, have an interest in maintaining the integrity and stability of judicial sales. We respectfully submit that the confirmation of this sale made by the Referee after statutory notice to creditors, and without objection on the part of any of them, and affirmed by the District Court should stand, as being within the lower Court's sound judicial discretion with which this Court should not interfere.

Dated: September 29th, 1943.

Respectfully submitted,

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By THOMAS S. TOBIN,

Attorneys for Appellee.